IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 669 OF 2003

In the matter of section 433 & 434 of the Companies Act, 1956;

AND

In the matter of winding up of Numero Uno International Limited, a Company incorporated under the provisions of the Companies ACt, 1956;

Eros Multimedia Pvt. Ltd. .. Petitioners

Mr. Virendra Tulzapurkar with Mr. Shyam Mehta with Mr. J.P. Sen and Akshay Patil i/b. R.M. Azim & Co. for the petitioner.

Mr. Anil Menon for the company.

CORAM: S.U. KAMDAR, J.

DATE : 10TH DECEMBER, 2004.

P.C. :

1. The present company petition is filed under section 434 of the Companies Act (I) of 1956 on the ground that the company is unable to pay its debt. The claim of the petitioner in the present case is for the

principal amount of Rs.44,30,000/- and with interest it comes to Rs.66,73,607/-. The background facts of the present case are briefly stated as under :

2. The originally petitioner company was known as Rishima International Private Limited however the company was awarded a fresh Certificate Of Incorporation on 25.7.00 and the name of the company was changed from Rishima International Private Limited to Eros Multimedia Private Limited. The respondent company is the producer of television serial known as ‘Jai Hanuman’.

3. Under an agreement dated 13th April, 1999 executed by one Stanning Corporation and the respondent company, the said Stanning Corporation acquired the right, title and interest for exploitation of the said television serial ‘Jai Hanuman’. Under the said terms and conditions of the said agreement the said Stanning Corporation was entitled to release 108 episodes of the said ‘Jai Hanuman’ serial. The period for telecast was upto 30th April, 05. Sometime in or about 30.10.00 a tripartite agreement was arrived by and between the respondent company and the said Stanning Corporation. Under the said fresh arrangement which was arrived at it was agreed that the respondent company, shall waive rights of exploitation of the said teleserial ‘Jai Hanuman’ subject to the conditions set out therein. One

of the said condition in the agreement provided that the respondent company shall pay to the petitioner an aggregate amount of Rs.1,79,40,000/- in 3 instalments. It is an admitted position before me that out of the said three instalment two of the instalment of sum of Rs.59,70,000/- have been paid by the respondent company. However there has been default in making the payment of the last instalment of Rs.59,80,000/.

3. Pursuant to the demand made the respondent company by their letter dated 11.1.01 admitted the liability to pay the last instalment of Rs.59,80,000/- however sought time due to financial constraints. Ultimately an advocates notice was issued on 22.3.2001 demanding the payment of the said last instalment. On 7.5.2001 while admitting the liability to make payment of the last instalment of sum of Rs.59,80,000/- the company forwarded a cheque of Rs.15,50,000/- as and by way of part payment towards the outstanding dues. By the said letter the company also requested the petitioners to give their no-objection inrespect of the exploitation rights of first 26 episodes of the television serial so that the respondent company can sell the said rights in favour of the third parties. The petitioner accordingly issued the necessary No Objection Certificate.

4. Inspite of repeated reminders the balance amount

of Rs.44,30,000/- was not forthcoming from the respondent company and therefore a statutory notice was given on 26.5.2003 to which there was no reply from the respondent company.

5. In the aforesaid circumstances, the present petition is filed by the petitioner company by claiming that there has been an outstanding liability of principal amount of Rs.44,30,000/- with further interest which is claimed at the rate of 20% on the principal amount aggregating to sum of Rs.66,73,607/-.

6. The respondent company has filed reply to the said petition and has inter-alia raised the following defences;

(i). that the present petition is not maintainable because in essence it is a claim for specific performance of an agreement dated 30th October, 2000 and it is a settled law that in the winding up jurisdiction, claim in the nature of specific performance of any particular agreement is not maintainable;

(ii). that there is no agreement to pay interest at the rate of 20% and therefore the liability in respect of the same is disputed.

7. In support of his first contention the learned counsel for the respondents has contended that agreement inter-alia provides that all the master tapes are to be retained by the petitioner till and until the last payment is effected. It is the case of the petitioner that in spite of the fact that all the master tapes are lying with the petitioner and that he was at liberty to exploit the same. According to the learned counsel for the respondent company on failure of the petitioner to exploit the said telecast rights, it is the respondent company who is entitled to claim for damages. It is further contended that assuming that the petitioners claim is for Rs.59,80,000/- then also in view of the terms of the agreement retaining the master tapes with the petitioner and that the same are to be returned against the payment of last instalment, it amounts to claim for specific performance of the said agreement and therefore the present petition is not maintainable. The learned counsel for the respondent company has drawn my attention to Clause 7 of the agreement which inter-alia reads as under :

> "7. The transaction would be completed and the rights on the Serial would revert to NUIL only on the last payment being made. Thereafter, NUIL would hold the world-wide rights for the

serial, and SC specifically declares that they would have no right, title or interest of any type in the serial."

8. By placing reliance on the aforesaid Clause-7 of the agreement, the learned counsel for the respondent has vehemently urged that the said Clause indicates that simultaneous obligations have to be complied with by the petitioner and the respondent company and therefore to seek payment of the balance of last instalment amount would tantamount to specific performance of Clause-7 of the said agreement.

9. In addition thereto it has been urged as the second ground of contention that there is no agreement between the parties to pay interest much less at the rate of 20% as claimed for by the petitioner. He drew my attention to the said agreement inter-alia indicating that there is no clause for payment of interest. According to him this itself is bonafide dispute and therefore the present company petition should be dismissed.

10. The learned Counsel for the petitioner on the other hand urged that Clause-7 of the said agreement does not contemplate any specific performance of agreement. He has further urged that on proper reading of Clause-7,

it is clear that the retaining of master tapes was actually provided by way of security and not for exploitation as claimed by the respondent company. He has further contended that Clause-5 of the said agreement makes it clear that the petitioner is not entitled to exploitation in as much as master tapes of the television serial 'Jai Hanuman' is concerned and therefore the contention raised by the respondent company for the alleged claim of specific performance is baseless and not bonafide. He has further contended that the rate of interest though not specified in the agreement, the same is based on market rate of interest. He has further contended that even if the claim of interest is not in accordance with agreement still if the claim of the petitioner is more than Rs.500/-, then the present petition is maintainable and the respondent company is liable to be wound up for non-payment of the claim of the petitioner herein.

11. I have perused the agreement dated 30.10.2000. I do not find any substance in the contention raised by the respondent company. The liability to make payment of Rs.59,80,000/- under Clause-4 of the agreement as and by way of last payment is unequivocal and accepted by the company. Thus the liability to make payment is not attached with performance of any corresponding obligtion on the part of the petitioner - save and except to retain

the master tapes which is obviously kept as security as can be evidenced from Clause-5 of the said petition. There is no clause in the agreement which indicates that the petitioner was entitled to exploit the said television serial even while accepting the payment from time to time under Clause-4 of the agreement. The contention of the respondent company that the respondent company is entitled to the claim of damages for non-exploitation of the television serial is baseless and without any merits. I am unable to hold from the aforesaid contention that the claim in the present petition tentamounts to specific performance of the agreement dated 13th Arpil, 1999. Apart from the aforesaid facts, it is very pertinent to note that there is not one but many acknowledgements of liabilities on the part of the respondent company. Infact the respondent company has made payment of two of the instalments as contemplated under Clause-4 of the said agreement and even in respect of the third instalments a part payment is made of Rs.15,50,000/-. Thus obviously, the defence raised of so called specific performance is baseless. In the aforesaid circumstances, I do not find any merits in the said contention and reject the same.

12. Insofar as claim pertaining to interest is concerned , I am of the view that admittedly there is delay in making payment of the principal amount as

contemplated by the agreement dated 30th October, 2000 thus the liability of interest arises on the respondent company. However, in view of the fact that the accepted rate is not stipulated in the agreement, I am of the opinion that the following order should be passed in the interest of justice between the parties;

(i). The respondent company is directed to deposit in this court, the balance of the principal amount of Rs.44,30,000/- on or before 10th February, 2005.

(ii). If such a deposit is made by the respondent company, then the petitioner to file a suit and the amount so deposited to be transferred to the credit of the suit and the same to be invested in fixed deposit initially for a period of three years and the same should be renewed from time time until further orders of this Court.

(iii). In the event of failure on the part of the respondent company to deposit the aforesaid amount of Rs.44,30,000/- the petition to stand admitted and the same to be advertised in Free Press Journal, Nav Shakti and Maharashtra Government Gazette at the costs of the

petitioner.

(iv). The petitioner shall in addition deposit a sum of Rs.2,000/- with the Prothonotary and Sr. Master towards costs.

13. Petition stand disposed off accordingly with no order as to costs.

SD/-

****